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92-242
NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM.1992

HENRY J. PODGURSKY

Petitioner

vs.

OFFICE OF PERSONNEL MANAGEMENT

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

HENRY J. PODGURSKY
14 Ann Lane
Rye, New York, #10580
914-967-4299
Petitioner, pro se.

## QUESTION PRESENTED

Is 'Rint v OPM' constitional or not, since the petitioner believes that there is ambiquity and conflict in its opinion, thusly barring "due process" for the petitioner.

TABLE OF CONTENTS

PAGE

Question presented.....i

Opinion below.....1

Jurisdiction.....2

Statues.....2

Constitution.....2

The proceedings below.....2-3

Parties to this proceeding.....3

Argument.....3

1. Contractual violation.....4
2. Conflict.....4

Reason for granting writ.....4

Conclusion.....5

Appendices

Appendix A
Decision of the United States Court of Appeals for the Federal Circuit April 15, 1992.....1-3

Appendix B
Administrative law decision June 28 1991.....4-9

IN THE
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OCTOBER TERM, 1992

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HENRY J PODGURSKY
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vs

OFFICE OF PERSONNEL MANAGEMENT
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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

## PRAYER

The Petitioner, HENRY J PODGURSKY, Appellant in the Court below, respectfully pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Federal Circuit entered in this case.

## OPINION BELOW

THE UNITED STATES COURT of APPEALS for the FEDERAL CIRCUIT, affirmed the lower courts in denying a United States Civil Service annuity to the Appellant. Reproduced hereto as App. A.

## JURISDICTION

The Opinion and Judgement of the United States Court of Appeals for the Federal Circuit was filed on April 15, 1992. This Petition is filed within 90 days thereafter. The jurisdiction of this Court is envoked under Title 28 U.S.C. #1254 (a).

## STATUES

28 U.S.C. Sec. 1254 (i):
"Cases in the Courts of Appeals may be reviewed by the Supreme Court by (1) By writ of certiorari.....".

## CONSTITUTION

U.S. Const., Amend 1;
".....for a redress of grievances.

U.S. CONST., Amend V;
"No person shall be.....deprived of.....without due process..."

## THE PROCEEDINGS BELOW

The AJ, citing 'Rint v OPM'[i], held that, given the 38 years period that past between the time the refund was authorized and when the petitioner stated he had not received the government check, OPM would be prejudiced if required to prove petitioners' actual receipt

[i] Rint v OPM 46 MSPR 29 30-31(1990). Docket No. SE08318910585-1 (May 13, 1991). Reproduced hereto as App. B.

of the check because the Treasury Department distroys checks after 10 years holding. The AJ's opinion is reproduced hereto as App. B.

PARTIES TO THIS PROCEEDING

The caption of this case in this Court contains the parties.

ARGUMENT

Petitioner found 'certificate of membership' in attic, 38 years later, still 'time is not of the essence', and files for an annuity.

OPM submits circumstancal evidence not privy to "acceptance", in form of filing and book-keeping records indicating a 'rubber stamped refund approval' which has no actual control over an 'overt act of acceptance'that is yet to be proven.

The Petitioners ability to defend was also impaired and would be prejudiced if definitive proof where required to verify whether the signature where of a third party; bearing in mind that the rebirth of the 'craddle of sin' in East New York, Brooklyn, at that time forced the Appellant to move out to safer grounds.

## CONTRACTUAL VIOLATION

'Rint v OPM', violates the contractual nature between the United States Civil Service and the Petitioner, in this case. ( Dues as consideration and condition subsequent as 5 years qualified service - 1946 to 1952)

This relationship dictates the inherent right for an annuity and can not be waived except by proof of an overt act of acceptance. OPM has not proven its case.

## CONFLICT

The petitioner believes that the lower court erred because its opinion when citing[1] 'Chessman' becomes corrupted by not stating which period of service. The AJ correctly cites 'Chessman' for the period 1958,1965, and 1966 of which the period 1946 to 1952 is the lenght of service considerd in this case as qualifying.

## REASON FOR GRANTING WRIT

The Court should grant certiorari in order to temper the validity of 'Rint v OPM' because of its 'double edge sword' opinion denying 'due process'.

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[1] Chessman cited hereto as App. A and App B.

## CONCLUSION

Petitioner does not contest the salutary aim of OPM in its effort to settle a dispute.

It is after all, the goal of OPM. But let not such aim disregard for 'due process'.

WHEREFOR, for the above and foregoing reasons. Petitioner respectfully pray that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Federal Circuit.because of conflict and ambiquity. WHEREFOR, if this Honorable Court decides that 'Rint v OPM', is uncontitional in that it freezes over the mechanics of 'due process'; violates public trustin our judicial system; allows for illegal shedding of government documents without file; than this case is of such imperative public importance due justify deviation from normal appelate practice and to require immediate settlement in this Court.

Respectfully submitted

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APPENDIX

APPENDIX A

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-3067

HENRY J PODGURSKY
Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT
Respondent

DECIDED: April 15, 1992

Before RICH, MAYER, and CLEVENGER, Circuit Judges.
PER CURIAM.

DECISION

Henry J. Podgursky(Podgursky) petitions for review of the October 17, 1991 Merit Systems Protection Board decision, Docket No. NY08319110252, affirming the office of Personnel Management's (OPM) reconsideration decision denying his application for a civil service retirement Annuity. We affirm.

DISCUSSION

Podgursky was employed by the Veterans Administration from March 22, 1946 through June 10, 1951, and by the Army Corps of Engineers from June 11, 1951 until August 8, 1952 when he resigned. Podgursky returned to federal employment for approximately one week in 1958 and for a six-month period in 1965-66. In July 1990, Podgursky filed an "Application for Deferred Retirement" with OPM pursuant to 5 U.S.C.#8338(a).

OPM denied Podgursky's application for a deferred annuity because, among other things, he had received a lump-sum refund of his retirement deductions when he resigned from the service in 1952 and had not redeposited the money in the fund during his subsequent employment.*

Podgursky appealed OPM's decision to the Board on March 15, 1991 alleging that he had never applied for nor received the refund. The Administrative Judge (AJ) found that OPM had produced evidence sufficient to sustain its position that Podgursky had applied for and received the refund in 1952. Specifically, OPM had produced an "Application for Refund of Retirement Deductions" dated August 14, 1952 and signed by Podgursky as well as a copy of his "Individual Retirement Record" indicating that the refund was approved on September 8, 1952. The AJ held that, given the 38-year period that passed between the time the refund

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*The receipt of a lump-sum refund voids any future entitlement to an annuity based upon the period for which the deductions were withheld unless the refund, plus interest, is redeposited while the employee is reemployed in the civil service. 5 U.S.C.&8342(a), 8334(d) (1); Yarbrough v. Office of Personnel Mangement, 770 F.2d 1056, 1060-61 (Fed. Cir. 1985).

was authorized and when Podgursky stated he had not received the check, OPM would be prejudiced if required to prove Podgursky's actual receipt of the check.

We review the Board's decision under a very narrow standard, affirming the decision unless it is (1)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or requlation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. & 7703 (c) (1988); Covington v. Department of Health and Human Servs., 750 F.2d 937,941 (Fed. Cir. 1984). Podgursky did not deny that the the signature on the refund application form was his, nor that the lump-sum payment was made. In a one-sentence affidavit submitted to the Board, Podgursky stated that "to the best of my knowledge, no refund from OPM was received." The AJ did not err when she determined that this affidavit fell far short of meeting Podgursky's argument that "OPM failed to prove its case" because it failed to prove actual receipt of the refund check is rejected as an improper attempt to shift the burden of proof onto OPM. The burden rests with the employee, not OPM, to establish entitlement to benefits. Cheeseman v. Office of Personnel Management, 791 F.2d 138,141 (Fed Cir. 1986), cert. denied, 479 U.S. 1037 (1987). Finding no error in the Boards decision, we affirm.

APPENDIX B

App 4

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

| | |
|---|---|
| HENRY J. PODGURSKY<br>Appellant,<br>V.<br>OFFICE OF PERSONNEL MANAGEMENT<br>Agency.<br>(CSA 3 226 872) | DOCKET NUMBER<br>NY08319110252<br><br>DATE: June 28 1991 |

Henry J. Podgursky, Rye, New York, pro se.
Jane N. Lohr, Washington, D.C., for the agency.

BEFORE

JoAnn M. Ruggiero
Administrative Judge

INITIAL DECISION

Introduction

By timely appeal, Mr. Podgursky challenged the agency's reconsideration decision denying his request for a Civil Service Retirement System (CSRS) annuity. The reason given by the agency for denying the request was that the appellant applied for and received a refund of his retirement deductions when he left federal service in 1952 and that the refund ended his retirement rights.

The Board has jurisdiction over the appeal.

5U.S.C. & 8347 (d) (1) (West Supp. 1990); 5 C.F.R. & 831.110 (1991). Because the appellant waived his right to a hearing, I have adjudicated the appeal on the parties' written submissions.

For the reasons discussed below, the Agency's reconsideration decision is AFFIRMED.

## Analysis and Findings

The appellant has the burden of proving that he is entitled to an annuity. Cheeseman v. office Personnel Management, 791 F.2d 138, 140-41 Fed. Cir. 1986), cert. denied, 479 U.S. 1037(1987).

The record reflects that the appellant worked for the Veterans Administration from 1946 through early June 1951 and that he then worked for the Army Corps of Engineers until August 8, 1952 at which time he resigned. He returned to federal service on July 28, 1958 and resigned very shortly thereafter--on August 5, 1958. He returned to federal service once again on November 8, 1965 and resigned on May 23, 1966. On July 7. 1990, he filed with the agency an application for a deferred annuity. In an initial decision, the agency informed him that the application was being denied beccuse, when he resigned from service in 1952, he received a refund of his retirement deductions in the amount of $951.87 including interest. The initial decision also

stated that he could apply for a refund of the retirement deductions made during his subsequent federal service which was less than one year.

By letter dated December 7, 1990, the appellant requested that the agency reconsider its initial decision and advised the agency that, to the best of his knowledge, he did not file for a refund or receive a refund.

On reconsideration, the agency affirmed its initial decision. In the reconsideration decision, the agency stated that on August 14, 1952, the appellant filed an application for a refund of his retirement deductions and that the refund was authorized on September 8, 1952. The agency further stated that the Department of the Treasury does not retain checks from as far back as 1952 and there is no record indicating that the check was not delivered to the appellant. Citing 5 U.S.C. &8334(d), the agency stated that because the appellant is not currently employed by the federal government, he is not eligible to deposit the amount he received back into the fund.

On March 15 1991, the appellant filed the instant appeal. In its response, the agency included a copy of Standard Form (SF) 102

("Application for Refund of Retirement Deductions") dated August 14, 1952. The form bears the signature "Henry J. Podgursky". The agency also included a copy of the appellant's "Individual Retirement Record" indicating that a refund totaling $951.87 was approved for the appellant on September 8, 1952 under Voucher GS-12992-R.

The appellant did not claim that the signature on the SF 102 was not his. However, he stated during a telephonic conference that he did not receive a refund and he submitted an affidavit stating that, to the best of his knowledge, he did not receive a refund.

In Rint v. Office of Personnel Management, 46 M.S.P.R. 29, 30-31 (1990), the record revealed that the appellant applied for a refund of his retirement deductions and that a refund was authorized. The record did not indicate whether the Department of the Treasury issued the check to the appellant or whether the appellant received it. Nevertheless, the administrative judge determined that the appellant received the refund because the appellant did not specifically deny receiving the check, but only claimed that the agency did not prove that he did not receive it.

On appeal, the Board vacated the judge's decision and remanded the appeal to the regional office for further adjudication. The Board construed the appellant's claim as an allegation that he never received the check, and the Board found that a remand was necessary given the agency's failure to submit evidence indicating that the check was in fact sent to the appellant or received by him. On remand, the judge determined that the appellant was entitled to an annuity, but the Board reversed. The Board noted that the Department of theTreasury does not retain cancelled checks for more than ten years; that there was no evidence indicating the check was returned as undelivered; and that more than thirty-seven years elapsed before the appellant stated that he had not received the check. The Board found that under those circumstances, the agency's ability to defend was impaired and the agency would be prejudiced if definitive proof of receipt of the check were required. Rint, M.S.P.B. Docket No. SE08318910585-1 (May 13 1991)

The appellant in the instant case advised the agency in a letter dated December 7, 1990 that, to the best of his knowledge, he did not file for or receive a refund. The agency subsequently produced copies of documents indicating that the appellant did file for

a refund and that the refund was authorized. Other than the appellant's statements that he did not receive a refund, there is no evidence to support his claim. The record does not reflect that the check was returned to the Department of the Treasury. Moreover, approximately thirty-eight years passed between the time that the refund was authorized and the time that the appellant stated that he did not receive the check. As in 'Rint', the agency would be prejudiced if definitive proof of receipt of the check were required.

In view of the foregoing as well as the fact that the appellsnt's federal service in 1958, 1965, and 1966 totaled less than a year, I find that the appellant did not establish his entitlement to a civil service annuity.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD:

JoAnn M. Ruggiero
Administrative Judge